Supreme Court, U.S.
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NO. 03-507

IN THE
SUPREME COURT OF THE UNITED STATES

FAX.COM, INC.
Petitioner,

v.

STATE OF MISSOURI EX REL.
JEREMIAH W. (JAY) NIXON, *et al.*
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT ATTORNEY GENERAL OF MISSOURI IN OPPOSITION

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QUESTION PRESENTED

Can Congress, without violating the First Amendment, bar commercial advertisers from electronically entering homes and businesses and using facsimile machines located there to print their advertisements, with the recipient bearing the cost of that use, unless the recipient indicates a willingness to do so?

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STATEMENT

The Attorney General of Missouri seeks to use his authority under the Telephone Consumer Protection Act ("TCPA") to prevent "fax blasting," *i.e.*, the indiscriminate sending of unsolicited advertising via facsimile transmission to homes and businesses. Bringing suit against petitioner Fax.com and another "fax blaster," the Attorney General invoked 47 U.S.C. § 227(b)(1)(C), which bars any person from sending "an unsolicited advertisement to a telephone facsimile machine." State attorneys general are authorized to file such enforcement suits by 47 U.S.C. § 227(f)(1).

1. Prior to the arrival of the automobile and electronic communications, many Americans undoubtedly welcomed the diversion and service of the door-to-door salesman. The isolated farmer would relish not just the availability of goods or services, but the chance to gather news. Long before the days of mass retailers and automobiles, even a wealthy citydweller saw a benefit from those who would come to the door with their goods. Whether on the farm or in town, the person who wished to avoid the interference of the salesman simply declined his approach – or perhaps looked through a peephole and never opened the door. It was – and is – possible, when facing the prospect of a door-to-door salesman, to avoid any expense by immediately distinguishing between the desired and the undesired messenger or message.

Improved postal services created another means of reaching individual homes and businesses. Thus we have today a great "direct mail" industry, filling

American mailboxes with everything from unsolicited credit card applications to magazine subscription offers. The burden on the recipient is comparable to that of the person looking through the peephole; the recipient can simply take the unwanted mail on "the 'short, though regular, journey from mail box to trash can.'" *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983), quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F.Supp. 880, 883 (S.D. N.Y. summarily aff'd, 386 F.2d 449 (2d Cir. 1967), cert. denied, 391 U.S. 915 (1968).

Direct mail and door-to-door selling have one important common characteristic: in each, the cost is borne entirely by the marketer; recipients pay nothing for the messages they may or may not want to receive.

The 20th Century brought new, electronic methods of delivering a commercial message to a home – most of which share the "no monetary cost to recipient" characteristic. Among them, radio and then television quickly became a significant, if not dominant, means of sending marketing messages into homes. Targeted recipients remained able to turn off the receiver or change the channel, without cost, to avoid an unwanted message.

Late in the 20th Century, marketers also turned to the telephone as a means of reaching into homes – and into businesses, where radios and televisions might not be present. "Telemarketing" has become increasingly problematic as its use has increased. Thus the petitioner correctly observes that a principal reason for passage of the TCPA was "public concern over the

BEST AVAILA

growing number of unwanted telephone solicitations." Pet. at 3. Direct mail, though annoying, had an impact on recipients only when they, at their own convenience, picked up letters and decided which ones to discard. But telephone calls interrupted personal lives and business activities on the schedule of the telemarketer. Where the recipient of mail could look at the envelope and (usually) determine whether it was worth opening, the anonymity of the telephone ring – and the possibility of an important personal or business message – demands that the recipient quickly pick up the receiver and listen.

As the number of telemarketing calls has increased, states have moved to stricter means of reducing the burden of their intrusions into homes and businesses, setting up "do not call" programs: lists of numbers that telemarketers cannot call without penalty. The federal government has recently taken that same path – a choice that is being challenged. *See Federal Trade Comm'n v. Mainstream Marketing Serv., Inc.*, 345 F.3d 850 (10th Cir. 2003).

Despite the considerable personal and business costs of unwanted telemarketing calls, that means of marketing retains a key characteristic common to door-to-door selling and mail solicitations: the recipient bears no monetary cost. This case is distinguishable from those addressing such "free" means of communication.

2. The Attorney General of Missouri filed suit against petitioner Fax.com, alleging that Fax.com "engag[ed] in a pattern or practice of sending unsolicited faxes, via facsimile transmission, computer, or

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other device to facsimile machines located in Missouri." Complaint (Docket 1) at 4. Recipients, including the State of Missouri, "receive multiple unsolicited fax advertisements from Fax.com." *Id.* at 3. The receipt of those advertisements "causes the recipients to pay for paper and toner, which otherwise would have been used to receive requested messages." *Id.* at 4. The receipt of these advertisements also "prevents other requested messages from being received and requires additional labor to handle the unsolicited messages." *Id.*

Throughout this litigation, there has never been any dispute that petitioner "provide[s] promotional services by transmitting client advertisements to the fax machines of potential customers." Petition Appendix (Pet. App.) at 4a. Nor has there been any dispute that "unsolicited fax advertising shifts costs to the recipients who are forced to contribute ink, paper, wear on their fax machines, as well as personal time" to the advertiser's purposes. *Id.* *See also id.* at 32a. Fax.com's principal rebuttal to these points was "that the cost is *de minimus*." *Id.* at 34a.

Petitioner moved to dismiss the complaint, arguing that "the TCPA violates the First Amendment right to freedom of speech." *Id.* at 20a. (Docket 9) That constitutional attack prompted the United States to intervene. (Docket 38) The district court determined that because the TCPA regulated commercial speech, its constitutionality would be determined under the test articulated in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Pet. App. 45a. The court determined

that proper application of the *Central Hudson* test would require giving "the government an opportunity to meet its burden" in an evidentiary hearing. Pet. App. 46a. At that hearing, the Attorney General and the United States presented witnesses who testified concerning the impact – monetary and otherwise – of unsolicited fax advertising. Pet. App. 23a-27a.

The district court did not make formal findings of fact. But it held that the "government simply fails to meet its burden of demonstrating that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Pet. App. 41a. The U.S. Court of Appeals for the Eighth Circuit reversed. That court, too, applied *Central Hudson*. Pet. App. 6a. But it "conclude[d] that the Government has demonstrated a substantial interest in restricting fax advertisements in order to prevent cost shifting and interference such unwarranted advertising places on the recipient." Pet. App. 9a.

ARGUMENT

The increasing use and impact of electronic marketing tools make the constitutionality of the TCPA – and the broader issue of the proper application of the First Amendment and of *Central Hudson* – "of great importance." Pet. at 26. Questions similar to the one presented here are already being litigated in connection with "no-call" lists that address telemarketers using telephone services. *See Federal Trade Comm'n v. Mainstream Marketing Serv., Inc.*, 345 F.3d at 860. But the petitioner is wrong in asserting that the Eighth Circuit's decision, as important as it is,

demands this Court's attention now. It does not directly conflict with any other decision by this or any other court. There is no valid reason to suppose that if such a conflict arises, it will evade review. And the speech involved here presents a different threat than does the speech that led to the restrictions at issue in the cases petitioner cites.

1. Petitioner concedes that this and other cases "have yet to generate a deep split of authority over the specific issue of the constitutionality of the TCPA's fax restrictions." Pet. at 28. In making that concession, petitioner provides a rationale that suggests, in its view, that any such split is unlikely to reach this Court. Petitioner points out that because private TCPA suits must be filed in state courts, "few federal circuits will be asked to pass on the issues raised here," and claims that "many" of those state courts "will defer in practice to federal courts on issues of federal law." *Id.* Petitioner certainly overstates the willingness of state courts to follow the precedent set by a single federal circuit, particularly when, as petitioner then explains, such vast sums are involved – sums that will ensure representation by excellent counsel and the presentation of well-developed factual records. Moreover, petitioner's argument ignores the origin of this very case: a suit *by a state attorney general in federal court*. There is no reason whatever to suppose that other attorneys general will not bring their own suits. Indeed, other attorneys general have done so. *E.g.*, *Minnesota ex rel. Hatch v. Sunbelt Communications & Marketing*, 2002 WL 32156843 (D. Minn. 2002); *Texas v. American Blastfax, Inc.*, 164 F.Supp.2d 892 (W.D. Tex. 2001).

Petitioner also belittles the possibility of individual suits, as opposed to class actions, brought under 47 U.S.C. § 227(b)(3). Pet. App. at 28. Petitioner's calculation of a $1500 maximum award – and its conclusion that individuals have no real incentive to sue on their own – is based on the allowance of a $500 per violation award in § 227(b)(3)(B), trebled pursuant to § 227(b)(3)(C). But it assumes that the individual brings suit over a single violation. Frankly, if each "fax blaster" hit each recipient (*i.e.*, each potential plaintiff) just once, the TCPA would not address "blast faxing." It was the multiple intrusions by companies such as American BlastFax and Fax.com that prompted congressional action. When a particular person or company receives its tenth unsolicited fax from Fax.com, the potential recovery reaches $15,000. And as Fax.com continues to impose on that recipient's machinery, time, paper, and supplies, the amount – and the potential for individual, non-class action suits – continues to grow. Indeed, the very nature of the "blast faxing" — the business petitioner is attempting to protect – ensures that there will be individuals with an adequate incentive to sue on their own behalf.

2. In addition to claiming that not enough cases will be brought to create a "deep split" of the sort that often merits the grant of a writ of certiorari, petitioner asserts that cases will disappear as defendants settle, making this "one of the rare opportunities for the Court to address" the issues presented here. Pet. at 28-29. That claim is based on the explicit assumption that fax blasters will go out of business rather than post bonds and appeal. That assumption is unsubstantiated (except with a single unproven anecdote). But notably,

it is not enough, even if true, to make petitioner's point.

Petitioner's point depends on three additional, implicit assumptions: that the bulk of the cases – and, indeed, the key cases – will be brought in state courts; that there the fax blasters will have no ability to appeal prior to final judgment; and that if they do appeal after final judgment, they will have to post crippling bonds. Petitioner supports none of these assumptions with explanation or authority. And they ignore the wide range of state practices. *See*, *e.g.*, Renée Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 St. Mary's L. J. 729, 754 (1998) ("[T]hough many states have interlocutory appeal rules that are as restrictive as the federal model, others broadly permit interlocutory appeals. States like New York, Massachusetts, and Alaska have adopted the broadest rules permitting interlocutory appeal. In fact, a New York litigant can appeal almost any order that involves some part of the merits of the case or that affects a substantial right."). Indeed, there have been interlocutory appeals in state courts in private TCPA suits. *E.g.*, *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468 (Ga. App. 2000). There are myriad possibilities for these questions to be addressed on appeal, as they were here, before an adverse final judgment that allegedly carries a threat of economic disaster.

3. It is not enough for the petitioner to cite free speech cases generally, then claim that the Eighth Circuit's decision conflicts with them. This case deals with a form of communication that enters a home or business unbidden, then uses the recipient's resources

before the recipient even knows from whom the message is coming, much less its content. That distinguishes it from the lines of precedent petitioner cites.

More than 30 years ago the Court "categorically reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another." *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970). Since *Rowan*, this Court has reaffirmed that "the intrusion of speech into the home" is constitutionally significant. *Frisby v. Schultz*, 487 U.S. 474, 492-93 (1988). *See also Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 176 (2002) (Rehnquist, C.J., dissenting) (distinguishing between "speech taking place on another citizen's private property [and] speech taking place in public forums"). Petitioner does not attempt to deal directly with this distinction.

Petitioner does address it in a backhanded way, though only to belittle it. Petitioner asserts that "[f]axes, unlike calls, are received primarily by businesses," Pet. at 10, and again, that "most faxes are received" "in a business setting," Pet. at 11. Petitioner provides no support for that conclusion. Nor does petitioner account for the need that even businesses have for privacy – after all, businesses do not put their fax machines in areas accessible to the public. Nor does petitioner, in its reiteration of a series of alternative regulatory proposals, suggest a plan that would track that distinction, *e.g.*, a ban only on unsolicited faxes being sent into homes. That omission is not likely the result of inadvertence. It may be that petitioner does not want to distinguish between residential and business fax numbers. Or perhaps the distinction is

not feasible, either for technological reasons, or because of the huge number of home-based businesses and telecommuters. But so long as that distinction is not made, petitioner cannot entirely evade the *Rowan* declaration.

Moreover, none of the cases petitioner cites involve means of communication that impose direct monetary costs on recipients. Never has this Court suggested, much less held, that a person has a right to speak at his listener's expense. The cost for each individual fax may be small,[1] but it is a real cost, borne by real people. To date there is no split of authority as to the proper First Amendment analysis in a case where costs are imposed on listeners. Until there is such a split, there is no need for this Court to take up petitioner's cause.

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[1] It is not as small as petitioner suggests, however. Petitioner would have the Court conclude that it is only "a half-cent per page." Pet at 2. But the authority petitioner cites merely gives the current cost of paper as a half-cent per page. Pet. App. 32 n. 18. Anyone who has ever replaced a printer or fax machine, or purchased toner, ink, or other supplies, knows that paper, though a significant portion of the cost, is not the only expense.

CONCLUSION

For the reasons stated above, the Court should deny the petition.

Respectfully submitted,

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